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No. 85-78

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF ALASKA,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 4

REASONS WHY THE WRIT SHOULD BE DENIED 4

1. The District Court and the Court of Appeals Fully Considered the Issue and Correctly Decided the Case 4

2. The Issue Presented by the State of Alaska's Petition Has No National Significance or Adverse Public Policy Consequences and Thus Does Not Merit This Court's Review 6

3. The Petition for Certiorari Presents Only One Question; Not Two as Stated by Petitioner ... 9

CONCLUSION 9

TABLE OF AUTHORITIES

CASES: Page

The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870) 4, 7

Hardin v. *Jordan*, 140 U.S. 371 (1891) 5

Harrison v. *Fite*, 148 F. 371 (8th Cir. 1906) 5

Martin v. *Waddell*, 41 U.S. (16 Pet.) 234 (1842) 4

Minnehaha Creek Watershed Dist. v. *Hoffman*, 449 F. Supp. 876, 880 (D. Minn. 1978) *aff'd in part, rev'd in part*, 597 F.2d 617 (8th Cir. 1979) 6

Oregon v. *Riverfront Protection Ass'n*, 672 F.2d 792 (9th Cir. 1982) 4

Pollard's Lessee v. *Hagen*, 44 U.S. (3 How.) 212 (1845) 4

Snively v. *State*, 167 Wash. 385, 9 P.2d 773 (1932) 6

State v. *Adams*, 89 N.W.2d 661 (Minn. 1958) 5

Steel Creek Development Corp. v. *James*, 58 N.C. 506, 294 S.E.2d 23, *rve. denied*, 306 N.C. 740, 295 S.E.2d 763 (1982) 6

United States v. *Holt State Bank*, 270 U.S. 49 (1925) . 5, 6

United States v. *Ladley*, 42 F.2d 474 (D. Idaho 1930) .. 5

United States v. *Utah*, 283 U.S. 64 (1931) 4, 7

Watt v. *Alaska*, 451 U.S. 259 (1981) 7

STATUTES:

Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487, 94 Stat. 2371 7

Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.* 2

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Bristol Bay Native Corporation, respectfully requests this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Ninth Circuit. That opinion is reported at 754 F.2d 851. The District Court opinion is reported at 563 F. Supp. 1223 (D. Ak. 1983).

STATEMENT OF THE CASE

The Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.* ("Settlement Act"), which was enacted to settle aboriginal land claims of the Native peoples of Alaska, required Alaska Natives to organize into 12 regional corporations and more than 200 village corporations. As part of the settlement, these corporations are entitled to receive title to approximately 40 million acres of land throughout Alaska. The Secretary of the Department of the Interior is responsible for administering the Settlement Act and for conveying land to the Native corporations.

Pursuant to the Settlement Act, Iliamna Natives Limited ("Iliamna"), a village corporation, and Bristol Bay Native Corporation ("Bristol Bay"), a regional corporation, selected certain land adjacent to Lake Iliamna, the largest lake in Alaska. Located on the lands selected by Iliamna and Bristol Bay is a small lake commonly known as "Slopbucket Lake." As part of the process of adjudicating the selected lands, the Secretary determined that Slopbucket Lake was not navigable and that therefore the bed of Slopbucket Lake was public land. Accordingly, in 1980, the Secretary conveyed, by interim conveyance, the surface estate of the selected lands, including the bed of Slopbucket Lake, to Iliamna and the subsurface estate, including the bed of Slopbucket Lake, to Bristol Bay.

In 1981, the State of Alaska filed suit against the United States, Iliamna, and Bristol Bay to quiet title to the bed of Slopbucket Lake in the State. The State's complaint alleged that Slopbucket Lake is a navigable lake and that therefore, under the Equal Footing Doc-

trines, and other applicable legal doctrine, the State of Alaska owns the bed of Slopbucket Lake. The State based its claim that Slopbucket Lake is navigable principally on the fact that the lake had been used by floatplanes for take-offs and landings prior to Alaska's admission to the Union.

Bristol Bay and other non-Native Defendants answered the State's claim asserting that floatplane usage alone could not render a lake navigable for title purposes. The issue of floatplane usage as the sole basis for title navigability was presented to the District Court through the State of Alaska's Motion for Partial Summary Judgment and the United State's Motion to Dismiss.

The District Court reasoned that "[a]ll previously recognized modes of conducting commerce in determining navigability for title involve either vessels or activities in which the commerce at issue is conducted principally on the water itself . . ." 563 F. Supp. at 1228. The District Court concluded by holding that "[s]ince floatplanes operate primarily in the air as opposed to the water, they are not a mode of conducting commerce on water for the purpose of the test." *Id.* The State of Alaska thereafter decided to waive its right to present evidence of usage other than floatplanes and the District Court therefore dismissed the State's complaint to quiet title to Slopbucket Lake in the State of Alaska.

The Court of Appeals affirmed the District Court decision applying much the same reasoning. The Court of Appeals noted that the central theme of title navigability cases is that there must be "movement of people and goods from point to point on the water."

754 F.2d at 854. The Court of Appeals further explained that a lake "is a terminus or launching point for floatplanes, not, 'a *channel* for useful commerce.' (*citation omitted.*) The floatplanes go to and from the lake, they do not travel on the water." *Id.*

This case, therefore, presents solely the issue of whether the State of Alaska owns the land and natural resources under a small, isolated lake accessible only by floatplane.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The District Court and Court of Appeals Fully Considered the Issue and Correctly Decided the Case.

Since the mid 19th century, this Court has held that a State, upon admission to the Union of States, acquires fee simple title to the land under waters which are used or susceptible of use in their ordinary condition as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1870); *Pollard's Lessee* v. *Hagen,* 44 U.S. (3 How.) 212 (1845); *Martin* v. *Waddell,* 41 U.S. (16 Pet.) 234 (1842). Both this Court and the Court of Appeals for the Ninth Circuit have recognized a broad range of uses to be sufficient to prove title navigability. *See e.g., United States* v. *Utah,* 283 U.S. 64, 82-83 (1931) (small boats); *Oregon* v. *Riverfront Protection Ass'n.,* 672 F.2d 792 (9th Cir. 1982) (holding that use of a river for floating logs to market was sufficient to establish title navigability). However, it is equally well established that some uses of a waterbody, if slight or incidental or not part of trade and commerce, are not sufficient to

render that water body navigable for title purposes. In particular, the courts have uniformly held that small, isolated lakes are not navigable for title purposes. *See e.g., Harrison* v. *Fite,* 148 F. 781 (8th Cir. 1906); *United States* v. *Ladley,* 42 F.2d 474 (D. Idaho 1930); *State* v. *Adams,* 89 N.W.2d 661, 677 n.1 (Minn. 1958) (citing 19 cases in which small lakes were found non-navigable).

The decisions of both the District Court and Court of Appeals recognized that there are limits on the principle of navigability for title purposes and that floatplane usage does not satisfy the minimum requirements. Each court held that use of a lake for take-offs and landings of a floatplane is not equivalent to use of the lake for trade and travel as a highway or channel for commerce on water. The Court of Appeals stated: "[Use of water for trade and travel] necessarily involves the utilization of the waterway as a path between two points." 754 F.2d at 854. The District Court stated it only slightly differently:

> All previously recognized modes of conducting commerce in determining navigability for title involve either vessels or activities in which the commerce at issue is conducted primarily on the water itself.

Case law makes clear that use of water must be an integral part of the transportation route and not a use which is merely incidental to travel by another mode. *Compare Hardin* v. *Jordan,* 140 U.S. 371, 396 (1891) *with United States* v. *Holt State Bank,* 270 U.S. 49 (1925). In reaching their respective conclusions, both courts were following well established case precedent.

2. The Issue Presented by The State of Alaska's Petition Has No National Significance or Adverse Public Policy Consequences and Thus Does Not Merit This Court's Review.

Prior to this case, three reported decisions have referred to floatplane usage in discussing title navigability issues. However, none of these cases were decided on the basis of floatplane usage and none suggest that such usage alone would suffice. *See Minnehaha Creek Watershed Dist.* v. *Hoffman,* 449 F. Supp. 876, 880 (D. Minn. 1978) *aff'd in part, rev'd in part,* 597 F.2d 617 (8th Cir. 1979); *Steel Creek Development Corp.* v. *James,* 58 N.C. 506, 294 S.E.2d 23, 27 *rev. denied* 306 N.C. 740, 295 S.E.2d 763 (1982); *Snively* v. *State,* 167 Wash. 385, 9 P.2d 773 (1932).

The paucity of cases dealing with floatplanes is due, no doubt, to the narrowness of the issue. Under established case precedent, navigability must be determined as of the date a State is admitted to the Union. *United States* v. *Holt State Bank,* 270 U.S. 49, 56 (1926). Since only Alaska and Hawaii were admitted as States after the commercial use of floatplanes came into being, only the States of Alaska and Hawaii are in a legal position to advance a claim of ownership to the beds of small, isolated lakes based on floatplane usage. Since Hawaii has few, if any, lakes and rivers which are used exclusively by floatplanes, the issue has legal significance solely to the State of Alaska.

Had the Court of Appeals held in favor of the State of Alaska, its decision would have had serious adverse public policy consequences. There are more than 3 million inland lakes in Alaska. Most of these lakes are small, shallow and isolated from all means

of transportation except floatplanes. If the Court of Appeals had held that floatplane usage is sufficient to establish navigability, then the State of Alaska would have received title to land and resources under these small isolated lakes.* This would be a tremendous windfall for Alaska when compared to lower 48 states since title to the beds of small, isolated lakes is not a benefit other states have received. Furthermore, a holding in favor of the State of Alaska would have created numerous islands of State owned land within the lands conveyed to Native corporations pursuant to the Settlement Act and similar "holes" of State owned land in the national parks, wildlife refuges, wild and scenic rivers and wilderness areas created by the Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487, 94 Stat. 2371 (1980). Indeed, in parts of northern and western Alaska, Native selections and national parks would become verit-

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* It is sufficient to establish navigability for title purposes to show that a waterbody is susceptible to use; proof of actual use is not necessary. *The Daniel Ball*, 77 U.S. (10 Wall) 557 (1871); *United States* v. *Utah*, 283 U.S. 64 (1931). In its Petition for Writ of Certiorari, the State argues that a decision favorable to the State "would not automatically have determined the navigability of any other waterbody in Alaska." Petition at 13 n.2 (con't.). This assertion is not consistent with the foregoing case law and also is *not* consistent with the State's previous assertions in the District Court that Slopbucket Lake is a "test case." *See* C.R. 128, at p. 13 (Transcript of Oral Argument); unnumbered docket entry dated April 4, 1984, at p. 4 (transcript of Oral Argument on Motion for Protective Order). Moreover, if the State's current proposition is accepted, its Petition is totally without merit since this case becomes simply a dispute over title to a few acres of submerged land, and even if wrongly decided, does not merit this Court's attention. *Cf. Watt* v. *Alaska*, 451 U.S. 259, 274-275 (1981) (Justice Stevens concurring).

able swiss cheese pocked with hundreds of islands of State owned land.

Because the Court of Appeals ruled in accordance with established case precedent concerning title navigability, none of the adverse public policy consequences discussed above has occurred. Ownership of the land and mineral resources under numerous small, isolated lakes throughout Alaska will be determined according to the same principles applicable to small, isolated lakes in the lower 48 States and most will be found non-navigable. The State of Alaska is not mistreated in comparison with its sister states. The reasonable expectations which existed at the time of statehood and during the first decade of Alaska's statehood (that is, prior to development of the novel argument concerning floatplane usage) are not upset and there is not a major and unanticipated intrusion of State inholdings into national parks, wildlife refuges, wild and scenic rivers, and wilderness areas. For these reasons then, this case does not present any major public policy issues.

Nor does the decision below have great significance for future cases or other appellate circuits. Even in its broadest context, the decision below has limited utility and precedential importance because floatplane usage to establish navigability for title purposes is simply too narrow an issue to have national significance and it is highly unlikely it will arise in any other Circuit.

In short, this case does not present any significant legal issue, major public policy issue, or grievous injustice which requires this Court's grant of the Petition for Writ of Certiorari.

3. The Petition for Writ of Certiorari Presents Only One Question; Not Two as Stated by Petitioner.

The State of Alaska's second question does not offer a separate ground for review. Both the District Court and the Court of Appeals accepted the State's factual assertions that Slopbucket Lake was used by floatplanes both before and after Alaska became a State. *See* 563 F. Supp. at 1228; 754 F.2d at 885. The District Court and Court of Appeals both ruled *as a matter of law* that floatplane usage standing alone, no matter how extensive, could not serve as the basis for proving title navigability. There is nothing more for the State to prove at trial. The State's second question, therefore, amounts simply to a restatement of its first question, namely, that this case presents the issue of whether floatplane usage may serve as the basis for title navigability and that issue does not merit consideration by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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